

ERIC A. GRASBERGER (*admitted pro hac vice*)
eric.grasberger@stoel.com

MARIO R. GRASBERGER (SB #273122)
mario.Grasberger@stoel.com

STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
Telephone: 503.224.3380
Facsimile: 503.220.2480

EDWARD C. DUCKERS (SB # 242113)
ed.duckers@stoel.com

STOEL RIVES LLP
Three Embarcadero Center, Suite 1120
San Francisco, CA 94111
Telephone: 415.617.8900
Facsimile: 415.617.8907

Attorneys for Plaintiff
JH Kelly, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In Re

PG&E CORPORATION

v.

AECOM TECHNICAL SERVICES, INC.

Case No. 4:20-CV-05381-HSG (Lead Case)

(Reference withdrawn from Bankruptcy
Case No. 19-30088, Adv. Proc. No. 20-
03019 and Adv. Proc. No. 19-03008)

(Consolidated with Case No. 3:20-cv-
08463-EMC)

**PLAINTIFF JH KLLY, LLC'S
DAUBERT MOTION TO EXCLUDE
PORTIONS OF EXPERT TESTIMONY
AND REPORTS OF TED SCOTT**

Hearing Date: May 31, 2022
Time: 11:00 a.m.
Location: Courtroom 2

Complaint Filed: January 25, 2019
Trial Date: June 20, 2022

TABLE OF CONTENTS

I.	INTRODUCTION	5
II.	STATEMENT OF FACTS	6
A.	Scott's October 18, 2021 Expert Report	6
III.	LEGAL STANDARD	7
IV.	ARGUMENT	8
A.	Scott's Analysis Regarding Phase 1/Window II Should be Excluded Because it is Based on Unsupported Assumptions and is Otherwise Irrelevant and Likely to Mislead the Jury.	8
1.	Brief Statement of Facts Regarding Phase 1/Window II (35 Days of Delay Attributed to Kelly).	8
2.	Argument Regarding Phase 1/Window II.	9
B.	Scott's Analysis Regarding Phase 2/Window I Should be Excluded For the Same Primary Reasons as Phase 1/Window II.	13
1.	Brief Statement of Facts Regarding Phase 2/Window I (32 Days of Delay Attributed to Kelly).	13
2.	Argument Regarding Phase 2/Window I.	13
C.	Scott's Analysis Regarding Phase 2/Window II is Based on a Flawed Methodology and Improper Assumptions, and is Otherwise Irrelevant.	14
1.	Brief Statement of Facts Regarding Phase 2/Window II (15 Days of Delay Attributed to Kelly).	14
2.	Argument Regarding Phase 2/Window II.	14
D.	The 6-Day Delay Attributed to Kelly In Phase 2/Window III is Supported Primarily by Irrelevant and Prejudicial Events.	16
1.	Brief Statement of Facts Regarding Phase 2/Window III (6 Days Attributed to Kelly).	16
2.	Argument Regarding Phase 2/Window III.	16
E.	Scott's Analysis Regarding Phase 2/Window IV Employs a Flawed Methodology and is Based on Assumptions.	17
1.	Brief Statement of Facts Regarding Phase 2/Window IV (Days Attributed to Kelly).	17
2.	Argument Regarding Phase 2/Window IV.	17
V.	CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<i>Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert)</i> , 509 U.S. 579 (1993).....	5, 6, 8
<i>HPS Mechanical, Inc. v. JMR Construction Corp.</i> , 2014 WL 3845176 (N.D. Cal. 2014).....	8
<i>In re Live Concert Antitrust Litig.</i> , 863 F. Supp. 2d 966 (C.D. Cal. 2012).....	9
<i>McGlinchy v. Shell Chem. Co.</i> , 845 F.2d 802 (9th Cir. 1988).....	10, 15
<i>Ollier v. Sweetwater Union High School Dist.</i> , 768 F.3d 843 (9th Cir. 2014).....	10, 15
<i>S&S Cummins Corp. v. West Bay Builders, Inc.</i> , 159 Cal. App. 4th 765 (2008).....	8
<i>U.S. v. Various Slot Machines on Guam</i> , 658 F.2d 697 (9th Cir. 1981).....	10

Rules

Fed. R. Evid. 104(a)	9
Fed. R. Evid. 402	5
Fed. R. Evid. 403	5
Fed. R. Evid. 702	5, 6, 8, 9
Fed. R. Evid. 702(b).....	10
Fed. R. Evid. 702(b)-(d).....	8
Fed. R. Evid. 702(c)	15
Fed. R. Evid. 702(d).....	15
Fed. R. Evid. 703	6, 8

Other Authorities

<i>Miller & Starr California Real Estate</i> § 31:72, Westlaw (4th ed. database updated Dec. 2021)	8
---	---

DAUBERT MOTION

Plaintiff JH Kelly, LLC (“Kelly”) respectfully submits this Daubert Motion (“Motion”) to exclude certain expert testimony and portions of the expert witness reports of Defendant AECOM Technical Services, Inc.’s (“AECOM”) expert witness Ted Scott.

This Motion is made pursuant to Federal Rules of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert)*, 509 U.S. 579 (1993), and its progeny on the grounds that such evidence is not based on sufficient facts or data, is not the product of reliable principles and methods, and does not reliably apply the relevant principles and methods to the facts of the case. This Motion is also made pursuant to Federal Rules of Evidence 402 and 403, on the grounds that such evidence is irrelevant, will waste time, will confuse the issues, and is prejudicial.

This Motion is based on the accompanying Memorandum of Points and Authorities, the Declaration of Eric A. Grasberger, the records on file in this action, and any further matters presented at the hearing on this Motion.

DATED: April 14, 2022

STOEL RIVES LLP

By: /s/ Edward C. Duckers

ERIC A. GRASBERGER (*admitted pro hac vice*)

EDWARD C. DUCKERS (SB # 242113)

MARIO R. NICHOLAS (SB #273122)

Attorneys for Plaintiff
JH Kelly, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Rules 702 and 703 of the Federal Rules of Evidence and *Daubert v. Merrill Dow Pharmaceuticals, Inc. (Daubert)*, 509 U.S. 579 (1993), Plaintiff JH Kelly, LLC (“Kelly”) moves to exclude the following portions of AECOM’s construction delay expert witness Ted Scott’s (“Scott”) testimony and Expert Reports¹:

- Scott’s opinion and analysis relating to Phase 1/Window II of his Report attributing a 35-day delay to Kelly due to Kelly’s alleged failure to catch a design conflict created by AECOM;
- Scott’s opinion and analysis in Phase 2/Window I of his Report attributing a 32-day delay to Kelly due to Kelly’s alleged failure to catch a design conflict created by AECOM (the same issue addressed above in Phase 1/Window II);
- Scott’s opinion and analysis in Phase 2/Window II of his Report attributing a 15-day delay to Kelly due to Kelly’s alleged slower than planned progress installing the underground conduit underneath the Auxiliary Building;
- Scott’s opinion and analysis in Phase 2/Window III of his Report attributing a 6-day delay to Kelly due to damage to a 4” gas line; and
- Scott’s opinion and analysis in Phase 2/Window IV of his Report attributing an 8-day delay to Kelly due to Kelly’s alleged slower than planned progress pulling wire and performing terminations.

Scott’s opinions regarding the above issues should be excluded because they are based on improper and unreliable reasoning, including unsupported assumptions, flawed methodology, and material that is otherwise more prejudicial than probative and is likely to mislead a jury.

The majority of the delay days attributed to Kelly (67 days) are based on the unsupported assumption that Kelly is 100% at fault for an electrical engineering conflict—the need to reroute a duct bank around the existing utility. Not only is Scott unqualified to opine on this electrical

¹ “Expert Reports” includes both Scott’s October 18, 2021 Report on Delay (“Report”) and his November 16, 2021 Reply Report on Delay.

1 engineering issue, but the only expert qualified to do so, Steven R. Lewis (“Lewis”), did not
 2 allocate fault between Kelly and Pacific Gas and Electric Company (“PG&E”). The delay
 3 attributed to Kelly is also unsupported because Scott assumes, without providing any evidence,
 4 that AECOM was working on redesigning around the electrical issue for the entire time periods
 5 referenced. Finally, Scott’s opinion is irrelevant because he agrees with Lewis that PG&E made
 6 the ultimate decision to re-route the duct bank at issue. Thus, Scott’s opinion and analysis should
 7 be excluded, as they are based on unsupported assumptions and are irrelevant.

8 Further, Scott’s opinion attributing 15 days of delay to Kelly for Kelly’s allegedly slower
 9 than planned progress installing the underground conduit underneath the Auxiliary Building is
 10 based on a flawed methodology, as Scott uses an incorrect and substantially higher amount of
 11 conduit for his calculation. This led to Scott calculating an erroneously high Kelly planned
 12 productivity rate, which ultimately resulted in Scott’s incorrect conclusion holding Kelly
 13 responsible for the delay. In addition, Scott’s opinion is irrelevant because he concludes by
 14 stating that it is “unclear what caused the delay.”

15 Moreover, Scott’s opinion relating to non-valve strike safety events should be excluded
 16 because its only purpose is to suggest that Kelly is an unsafe contractor, which has no bearing on
 17 the delay at issue. As such, Scott’s opinion is irrelevant and highly prejudicial to Kelly and
 18 should be excluded.

19 Finally, Scott’s opinion that Kelly is responsible for an 8-day delay relating to wire
 20 pulling should be excluded because Scott’s methodology is flawed and based on assumptions.
 21 Scott admits that the delay may be due to PG&E’s preferential changes and that he did not have
 22 the records available to him to determine how much time should be allocated to PG&E.

23 Accordingly, these portions of Scott’s testimony and report should be excluded.

24 **II. STATEMENT OF FACTS**

25 **A. Scott’s October 18, 2021 Expert Report.**

26 AECOM retained Scott as an expert witness to opine on the construction delays in this
 27 construction dispute. *See* Declaration of Eric A. Grasberger in Support of Daubert Motion to
 28 Exclude Expert Testimony of Ted Scott (“Grasberger Decl.”), Ex. 1 at Appendix A. On October

18, 2021, Scott produced his expert report. *Id.* The report is organized into three “Phases”—engineering, construction, and commissioning. *Id.* at 4, 9, 12. Phase 1 (engineering) includes two “Windows”; Phase 2 (construction) includes four “Windows”; and Phase 3 (commissioning) includes eight “Windows.” *Id.* at 7, 10, 14. For each Window, Scott defines the “critical path” time period at issue and attempts to allocate days of delay to the critical path among PG&E, AECOM and Kelly.² Scott’s total allocation of days of delay for the entire project is 425 days of delay to PG&E, 40 days of delay to AECOM and its separate third-party subcontractors, and 105 days of delay to Kelly. *Id.* at 14.

While Kelly intends to challenge the entirety of Scott’s allocation of 105 days of delay to Kelly at trial, this Motion seeks to exclude only the following allocations of delay to Kelly: (1) 35 days of delay in Phase 1/Window II; (2) 32 days of delay in Phase 2/Window I; (3) 15 days of delay in Phase 2/Window II; (4) 6 days of delay in Phase 2/Window III; and (5) 8 days of delay in Phase 2/Window IV. The facts supporting the Phases/Windows at issue are discussed in detail in Section IV, below.

15 III. LEGAL STANDARD

Under Federal Rule of Evidence 702, the court acts as the gatekeeper to ensure that proposed expert testimony “is not only relevant, but reliable” and that it “is sufficiently tied to the facts of the case [such] that it will aid the jury in resolving a factual dispute.” *Daubert*, 509 U.S. at 595. Federal Rule of Evidence 702 allows an expert witness to testify as to their opinion if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702(b)-(d). Federal Rule of Evidence 703 allows an expert to base an opinion on facts in a case that the expert has been made aware of or personally observed. Fed. R. Evid. 703. However, for the expert to rely on facts that would otherwise be inadmissible, it

² “Critical path” is a term of art in construction law and means the longest path of work activities on a project that must be accomplished in order to complete the project. *See 9 Miller & Starr California Real Estate* § 31:72, Westlaw (4th ed. database updated Dec. 2021); *see also S&S Cummins Corp. v. West Bay Builders, Inc.*, 159 Cal. App. 4th 765, 772 (2008); *see also HPS Mechanical, Inc. v. JMR Construction Corp.*, 2014 WL 3845176, at *27 (N.D. Cal. 2014).

1 must be established that experts in that particular field would reasonably rely on those kinds of
 2 facts. *Id.* “The admissibility of all expert testimony is governed by the principles of Rule 104(a).
 3 Under that Rule, the proponent [of the expert testimony] has the burden of establishing that the
 4 pertinent admissibility requirements are met by a preponderance of the evidence.” *In re Live*
 5 *Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 971 (C.D. Cal. 2012) (quoting Fed. R. Evid. 702,
 6 Notes of Advisory Committee on 2000 amendments (internal quotation marks deleted)).

7 **IV. ARGUMENT**

8 **A. Scott’s Analysis Regarding Phase 1/Window II Should be Excluded Because it** 9 **is Based on Unsupported Assumptions and is Otherwise Irrelevant and Likely** 10 **to Mislead the Jury.**

11 **1. Brief Statement of Facts Regarding Phase 1/Window II (35 Days of** 12 **Delay Attributed to Kelly).**

13 In Phase 1/Window II, Scott addresses an alleged 70-day delay to the critical path (from
 14 February 24, 2017 to May 5, 2017) as a result of the delayed issuance of the “IFC” (Issued for
 15 Construction) drawings. Grasberger Decl., Ex. 1 at 6. Scott opines that this 70-day delay is the
 16 result of “[1] PG&E’s preferential design changes as well as [2] the need to reroute the duct bank
 17 around the existing utility conflict.” *Id.* Scott attributes 100% of issue 1, “PG&E’s preferential
 18 design changes,” to PG&E, and 100% of issue 2, the “utility conflict,” to Kelly. *See id.* at 6, 55.
 19 Scott then equally splits, without any analysis to support the reasonableness of an even split, the
 20 70 days of delay between PG&E and Kelly (allocating 35 days of delay to Kelly for this
 21 Phase/Window).

22 Regarding issue 1, “PG&E’s preferential design changes,” which Scott attributes 100% to
 23 PG&E, Scott summarizes the impact of PG&E’s design changes as follows:

24 As can be seen from Figure 5-13 below, the approved below grade
 25 Electrical design was fundamentally different [sic] from what
 26 AECOM has submitted at the 90% Design Stage (which were the
 27 drawings from which JH Kelly based its bid).

28 I understand from discussions with Mr. Lewis, that these
 significant changes were attributable to PG&E’s change in design
 criteria (i.e., preferential changes and nice to have additions).

Id. at 52-53 (emphasis added).

1 The delay attributable to PG&E’s preferential design changes identified by Scott extend
2 beyond the time period at issue (February 24, 2017 to May 5, 2017). *See id.* at 54.

3 Regarding issue (2), the “utility conflict,” which Scott attributes 100% to Kelly, Scott
4 summarizes this issue as a “conflict between the new duct bank location and the existing
5 underground gas lines”. *Id.* at 50. It is undisputed that AECOM, the engineer of record, designed
6 the new duct bank location knowing there was an existing underground gas line intersecting with
7 the new duct bank location.

8 **2. Argument Regarding Phase 1/Window II.**

9 Expert testimony is properly excluded where the expert’s opinion is based on assumptions
10 unsupported by sufficient facts or data. *See* Fed. R. Evid. 702(b); *see also McGlinchy v. Shell*
11 *Chem. Co.*, 845 F.2d 802, 806-07 (9th Cir. 1988) (excluding expert’s study and future testimony
12 because it was based on unsupported assumptions, including speculation about the amount of the
13 appellants’ “lost profits”); *see also U.S. v. Various Slot Machines on Guam*, 658 F.2d 697, 700
14 (9th Cir. 1981) (stating “an expert must back up his opinion with specific facts”); *see also Ollier*
15 *v. Sweetwater Union High School Dist.*, 768 F.3d 843, 861 (9th Cir. 2014) (providing that
16 “speculative testimony is inherently unreliable” and excluding expert testimony in part because
17 their opinions were “unsupported by the facts”).

18 Scott attributes half of the 70-day delay for this time period (February 24, 2017 to May 5,
19 2017) to Kelly as a result of Kelly’s alleged late discovery of a “utility conflict” created by
20 AECOM’s own design. *See* Grasberger Decl., Ex. 1 at 6, 55. Scott’s opinion on this issue is
21 subject to exclusion because it is based on improper assumptions. Specifically, Scott makes the
22 following improper assumptions (each of which are addressed in more detail, below):

- 23 • Scott assumes that Kelly is 100% responsible for the utility conflict—which AECOM
24 (as the engineer of record) designed without any input from Kelly—while AECOM’s
25 own electrical engineering expert does not apportion any percentage of fault (let alone
26 100% fault) to Kelly;
- 27 • Scott assumes that AECOM worked continuously from February 24, 2017 to May 5,
28 2017 to resolve the utility conflict without any evidence to support this assumption;

- Scott assumes that PG&E's preferential decision to re-route the duct bank around the property is irrelevant while AECOM's own electrical engineering expert and lead engineer opine and testify that the delay resulting from the utility conflict could have been mitigated or avoided entirely if PG&E had not made that preferential decision; and
- Scott assumes that the impact of the PG&E's preferential design changes and the utility conflict are equal and should be apportioned 50/50 to this time period without any evidence to support this assumption.

First, Scott's assumption that Kelly is 100% responsible for failing to catch AECOM's own design error earlier than it did, and the ensuing delay, is improper and unsupported. Scott opines as follows in his opening report:

Should it be found that JH Kelly was responsible for catching the conflict earlier than they did, then they would share accountability for the delay. For purposes of this report, I assumed this to be the case and have split the delay equally between the two parties (i.e., 35 days to PG&E and 35 days to JH Kelly).

Id. at 6, 55 (emphasis added). Scott is not an electrical engineer and Scott recognizes that he is not qualified to opine on whether or when Kelly should have caught AECOM's design error. *See e.g. id.*, Ex. 2 at 38:17-39:4; 213:21-214:1. As this issue is outside Scott's expertise as a delay expert, Scott relies on the opinion of Lewis, AECOM's electrical engineering expert, to support Scott's assumption that Kelly—who had no design responsibility for the project—is 100% responsible for not catching AECOM's error that created the utility conflict. *See id.* However, contrary to Scott's assumption, Lewis testified that he did not and will not allocate fault between AECOM and Kelly regarding the utility conflict:

Q: Okay. And were you asked to allocate fault as between, in your opinion, at least, AECOM and JH Kelly concerning responsibility for the conflict between the gas piping and the existing electrical duct bank?

[objection]

A: I'm not sure that I could say specifically to assign fault in those cases. I was asked to evaluate the genesis and the solutions and – of the conflict.

1 ...

2 **Q:** Correct me if I'm wrong, you are not apportioning out fault in
3 terms of percentages to PG&E, AECOM, and JH Kelly, are you?

4 **A:** No.

5 **Q:** And you won't be doing that at trial; right?

6 **A:** Quantifying is not my scope.

7 *See id.*, Ex. 3 at 65:18-66:2; 202:3-9. Accordingly, the only AECOM expert qualified to opine on
8 the allocation of fault among Kelly, AECOM, and PG&E for the utility conflict expressly
9 declined to do so. As such, Scott cannot be permitted to assume that Kelly was 100% responsible
10 for catching the electrical engineering conflict earlier than it did, as that assumption is
11 unsupported and will confuse and mislead the jury.

12 **Second**, there is no evidence to support the assumption that AECOM was working to
13 resolve this electrical design conflict for the entire 70-day time period at issue. *See generally id.*,
14 Ex. 1. Scott did not even attempt to determine when AECOM, Scott's client, began redesigning
15 around the conflict. *See id.* at 55 ("based on the records that have been made available to me, I
16 have not been able to determine exactly when the change to routing of the duct bank was made").
17 For all Scott knows, AECOM may have only taken one day to make the necessary changes to
18 address the utility conflict. Similarly, Scott's opinion assumes that AECOM began this redesign
19 work on the February 24, 2017. *See id.*, Ex. 1 at 47. This start date is unsupported because there
20 is no evidence provided in Scott's report that AECOM received notice from Kelly of this issue on
21 February 24, 2017.³ *See id.* There is also no evidence that AECOM was working to address the
22 utility conflict continuously throughout the 70-day time period at issue. Scott's assumption that
23 AECOM was notified of the utility conflict on February 24, 2017 and worked continuously for 70
24 days to address the conflict is unsupported and will confuse and mislead the jury.

25 **Third**, Scott's opinion is irrelevant because the decision to re-route the duct bank around
26

27 ³ Scott's report states on pages 50-51 that Kelly gave notice in February 2017, but there is no
28 evidence supporting this statement, and it appears to be a typographical error, because on page 73,
Scott states that Kelly gave notice in March 2017.

1 the property was ultimately a preferential change made by PG&E. Scott bases his opinion on the
 2 opinions of both Dean Goward, AECOM's lead engineer, and Lewis, AECOM's electrical
 3 engineering expert. *Id.* at 51-53. Scott relies on the following Goward testimony:

4 ...we collectively worked as a team to resolve the issue and some
 5 options were [being put] that the underground duct was going to
 6 clash with the existing pipe. So we had a few options that were
 presented, one being that we go deeper and that we trench deeper
 under that pipe to avoid (inaudible).

7 Second option was that we actually come above ground and – and
 8 basically bridge that area with a structure to bring the conduit over
 and above.

9 The **third and least desirable, but which ended up being the**
 10 **option that was implemented**, was to completely avoid that area
 11 and reroute the duct banks. That duct bank is basically supplying
 the gas cooler area, and if we assume north is up on the page, we
 12 rerouted the duct bank to the east of the plant in order to supply the
 gas cooler area and avoid the pipe.

13 *Id.*, Ex. 4 at 99:13-100:5. (emphasis added). As to Scott's reliance on discussions with Lewis,
 14 Scott states:

15 I further understand from discussions with Mr. Lewis that he has
 16 analyzed the routing of the duct bank with respect to this existing
 utility and determined that **the option selected was indeed a**
 17 **preferential change by PG&E, as either of the less impactful**
 18 **solutions would have been possible from an engineering**
standpoint.

19 *Id.*, Ex. 1 at 51 (emphasis added). Scott further states:

20 As can be seen from Figure 5-13 below, the approved below grade
 21 Electrical design was fundamentally different [sic] from what
 AECOM has submitted at the 90% Design Stage (which were the
 22 drawings from which JH Kelly based its bid.

23 I understand from discussions with Mr. Lewis, that these
 significant changes were attributable to PG&E's change in design
 24 criteria (i.e., preferential changes and nice to have additions).

25 I also understand from discussions with Mr. Lewis that the change
 in duct bank routing along the Northern portion of the site in the 5
 May 2017 design (the left side of the drawing to the right) **was due**
 26 **[to] PG&E's refusal to allow the duct bank to be routed below**
 27 **or above the gas line.**

28 *Id.* at 52-53 (emphasis added). Thus, any alleged delay could have been mitigated entirely if

PG&E had not made the “preferential choice” to route around the perimeter of the building, an opinion supported by both Goward and Lewis. Accordingly, Scott’s opinion holding Kelly responsible for any delay is irrelevant because PG&E made the ultimate decision to re-route the duct bank around the property.

Finally, Scott arbitrarily splits 50/50 the delay during this 70-day time period between PG&E’s “significant” and “preferential” changes (Scott’s words) and the utility conflict issue. This arbitrary allocation is also unsupported by evidence and is likely to mislead the jury.

For these reasons, Scott’s analysis opining that Kelly is responsible for 35 days of delay in Phase 1/Window II based on the alleged utility conflict should be excluded.

B. Scott’s Analysis Regarding Phase 2/Window I Should be Excluded For the Same Primary Reasons as Phase 1/Window II.

1. Brief Statement of Facts Regarding Phase 2/Window I (32 Days of Delay Attributed to Kelly).

Scott states that Kelly should have commenced excavation and installation for the Auxiliary Building conduit installation on March 24, 2017. *Id.* at 74. Because Kelly commenced this work on June 1, 2017, the project was 64 days behind schedule, according to Scott. *Id.* Scott attributes half of this 64-day delay of the first delivery of conduit for the Auxiliary Building in Phase 2/Window I of the project to Kelly based again on “both PG&E’s preferential design changes as well as the need to reroute the duct bank around the existing utility conflict.” *Id.*

2. Argument Regarding Phase 2/Window I.

Because Scott’s analysis and opinion are based on these same events, they should be excluded for the same primary reasons as his opinion regarding the 70-day delay in Phase 1/Window II. Scott again expressly states that he assumed that Kelly should have caught the electrical conflict earlier than it did. *Id.* at 74. Scott should not be permitted to make this assumption, as there is no evidence to support this assumption, and he is not qualified to opine on this electrical engineering issue. The only expert qualified to opine on this issue, Mr. Lewis, declined to do so. *See id.*, Ex. 3.

Scott’s opinion is also based on the unsupported assumption that AECOM was working to

1 resolve the electrical engineering conflict for the entire time period at issue. Scott again states
 2 that based on the records of his client that have been made available to him, he has “not been able
 3 to determine exactly when the change to routing of the duct bank was made.” *Id.*, Ex. 1 at 74.

4 And finally, Scott’s opinion is irrelevant because PG&E made the ultimate preferential
 5 decision to reroute the duct bank. *Id.* at 51-53.

6 Accordingly, Scott’s opinion and testimony regarding the 64-day delay in Phase
 7 2/Window I should be excluded.

8 **C. Scott’s Analysis Regarding Phase 2/Window II is Based on a Flawed**
 9 **Methodology and Improper Assumptions, and is Otherwise Irrelevant.**

10 **1. Brief Statement of Facts Regarding Phase 2/Window II (15 Days of**
Delay Attributed to Kelly).

11 In Phase 2/Window II of the report (“UG Conduit Installation”), Scott attributes 7 days of
 12 delay to PG&E for “Boulder Excavation”, 19 days to PG&E for “Increased underground conduit
 13 as a result of PG&E’s preferential electrical changes”, and 15 days of delay to Kelly based on
 14 Kelly’s “[s]lower than planned progress installing the underground conduit underneath the
 15 Auxiliary Building.” *Id.* at 76, 86.

16 The 15 days attributed to Kelly are based on a calculation of Kelly’s productivity rate. *Id.*
 17 at 80-86. As discussed below, this calculation is flawed and unreliable.

18 **2. Argument Regarding Phase 2/Window II.**

19 Expert testimony can be excluded where the expert employed an invalid methodology or
 20 failed to reliably apply principles and methods to the facts of the case. *See* Fed. R. Evid. 702(c),
 21 (d); *see also McGlinchy*, 845 F.2d at 807 (excluding expert testimony where assessment of
 22 damages was “hopelessly flawed”); *see also Ollier*, 768 F.3d at 861 (excluding expert testimony
 23 where methodology was unreliable).

24 Scott’s opinion attributing 15 days of delay to Kelly for its “[s]lower than planned
 25 progress installing the underground conduit underneath the Auxiliary Building” is based on a
 26 seriously flawed methodology that is unreliable and likely to mislead the jury. Grasberger Decl.,
 27 Ex. 1 at 86. Scott’s calculation underpinning his analysis for this delay period assumes “900 lf of
 28 conduit underneath the Auxiliary Building.” *Id.* at 80. This is incorrect because the 900 lf figure

1 applies to the entire project site—not just the area under the Auxiliary Building, which is a
 2 significantly smaller area. *See id.*, Ex. 5 (providing that the length of duct bank should be about
 3 900ft for the entire project site). Based on Scott’s incorrect assumption, Scott calculates Kelly’s
 4 productivity rate: “[a]ccording to the Construction Baseline Schedule, JH Kelly planned to
 5 complete this work in 4 workdays (between 29 March and 3 April 2017). This equates to a
 6 productivity rate of 225 lf of conduit per day (900 lf / 4 days = 225 lf/day).” *Id.*, Ex. 1 at 80. As
 7 a result of Scott’s incorrect reliance on the **project-wide** 900 lf figure, Scott drastically overstates
 8 Kelly’s planned productivity rate at 225 lf/day for the area only under the Auxiliary Building.
 9 Scott’s overstatement of Kelly’s planned productivity level undermines his entire analysis on this
 10 delay event.

11 Scott uses this drastically overstated 225 lf/day number to calculate how long KELLY’s
 12 work should have taken. *Id.*, Ex. 1 at 80. He writes:

13 It is also my understanding that the final IFC Electrical design
 14 added 2,800 lf of conduit underneath the Auxiliary Building (for a
 15 total of 3,800 lf). Using JH Kelly’s planned productivity rate (as
 16 described above), this means the added work should have taken an
 additional 19 days to complete (2,800 lf / 255 lf per day = 19
 days).

17 *Id.* Scott then used this 19 days to attribute 15 days of delay to Scott. Scott states:

18 ...it actually took JH Kelly 47 calendar days to complete this work
 19 (18 July 2017 – 1 June 2017 = 47 days). Considering the planned
 20 duration of 6 calendar days to do this work (3 April 2017 – 29
 March 2017), JH Kelly took 41 calendar days longer than
 originally anticipated (47 days – 6 days = 41 days).

21 Considering the 7-day delay caused by the Boulders and the 19-
 22 day delay caused by the additional scope (for a total of 26 days),
 23 this means that JH Kelly lost an additional 15 days of delay in this
 work (41 days – 26 days = 15 days).

24 *Id.* at 84. Scott ultimately attributed this 15-day delay to Kelly for “[s]lower than planned
 25 progress installing the underground conduit underneath the Auxiliary Building.” *Id.* at 86.

26 Moreover, Scott’s opinion is irrelevant, as he ultimately concludes his analysis by stating
 27 that “[f]rom the documents that are available to me, it is unclear what caused this delay.” *Id.* at
 28 84.

Therefore, Scott's analysis regarding the 15-day delay attributed to Kelly in Phase 2/Window II should be excluded.

D. The 6-Day Delay Attributed to Kelly In Phase 2/Window III is Supported Primarily by Irrelevant and Prejudicial Events.

1. Brief Statement of Facts Regarding Phase 2/Window III (6 Days Attributed to Kelly).

Scott attributes 6 days of non-work time to Kelly between October 14-20, 2017. *Id.* at 95; Ex. 6 at 23. This opinion is based on a "Kelly subcontractor fuel truck [that] struck a 4" gas line on 14 October 2017" ("Valve Strike"), as well as on prior unrelated non-valve strike safety events. *Id.* But as discussed below, Scott's opinion is unsupported by any evidence.

2. Argument Regarding Phase 2/Window III.

As to the October 14, 2017 "Valve Strike" event, there is no evidence that this event delayed the entire project site or the critical path for the project. Indeed, the evidence that Scott references supporting his opinion only show that the east and northeast side of the site, at most, were delayed during this time. For example, Scott references Kelly's report of hindrances, stating, "all work on east fence line has been put on hold by PGE for checking out damaged gas line and cross compression testing." *Id.*, Ex. 1 at 94. (emphasis added). He also references AECOM's schedule delay log, which states:

All work on the east and north east side of the station stopped due to the fuel truck hitting the 4" gas line. PG&E had to blowdown the line and replace the damaged valve. This effected the Demo work on the Main Gas line at Tie-in 22 and 37 locations and DB 7 excavation activities. The gas line valve was replaced by 10-16-17 and line was saved out. PG&E would not let AECOM continue any construction activities on the east and North east side of the station until cross compression was completed on 10-20-17.

Id. (emphasis added). Indeed, Torres' report states, "as documented in the Kelly daily reports, only the northeast quadrant of the Project site was impacted through October 20, 2017." *Id.*, Ex. 7 at 19. Still, Scott states that, "[a]s the duct banks were on the actual critical path during this time period, I have attributed the 6 days of non-work time between 14 and 20 October as a JH Kelly delay..." *Id.*, Ex. 1 at 95. But, as explained in Torres' Rebuttal Report, this is incorrect. *See id.*, Ex. 7 at 20 ("The critical path is not through [the] underground ductbank, but rather

through the Auxiliary Building (where the Baseline Schedule critical path was planned)"). There is no evidence to support Scott's opinion that the that work on the duct bank was delayed by the Valve Strike event, or that the work on the duct bank was on the critical path for the project at this time.

Moreover, Scott references certain non-valve strike safety events—events unrelated to the critical duct bank work—which all occurred before October 2017. *Id.*, Ex. 6 at 22-23. Despite being unrelated to the duct bank work, Scott concluded:

Based on the above, it seems plausible that JH Kelly was responsible for some of the time it took to perform the critical duct bank work. For certain, it would have contributed to JH Kelly's cla[i]med inefficiencies.

However, given the documents made available to me, in terms of delay, I have only attributed the 6-day duration that the Project was shut down between 14 and 20 October 2017 to JH Kelly.

Id. at 23. This shows that Scott attributes no days of delay to these non-valve strike events. Because these events do not relate to the critical bank duct work, the only purpose of referencing these events is to suggest that Kelly is an unsafe contractor. *Id.* As Scott is AECOM's delay expert, these events not causing delay are outside Scott's expertise. They should therefore be excluded because they could only serve to confuse the jury and risk unfair bias against Kelly.

As such, the 6-day delay attributed to Kelly and the non-valve strike safety events should be excluded because, as to the delay, it is unsupported, and as to the events, they are irrelevant and prejudicial and are meant to create an unfair bias with the jury.

E. Scott's Analysis Regarding Phase 2/Window IV Employs a Flawed Methodology and is Based on Assumptions.

1. Brief Statement of Facts Regarding Phase 2/Window IV (Days Attributed to Kelly).

Scott attributes 8 days of delay to Kelly for taking "longer than planned for JH Kelly to pull wire such that JH Kelly was only 30% complete with this work when the critical path shifted into Commissioning." *Id.*, Ex. 1 at 98.

2. Argument Regarding Phase 2/Window IV.

Scott's opinion and analysis should be excluded. Scott's methodology is flawed and

likely to mislead the jury because Scott assumes that this issue is entirely Kelly's fault despite acknowledging that he is making assumptions based on inadequate documentation:

While it is possible that some of this additional time was due to PG&E's preferential changes (i.e., added duct bank and conduit), I do not have the records available to me to determine how much, if any, time should be allocated to PG&E. Therefore, for purposes of this report, I have **assumed** all of the delay is due to JH Kelly as this was part of their scope to complete in a timely manner.

Id., Ex. 1 at 98 (emphasis added). Scott's methodology is based on unsupported assumptions and should be excluded.

V. CONCLUSION

For the foregoing reasons, Kelly respectfully requests that the Court grant its Motion and exclude the above portions of the expert testimony and reports of Ted Scott.

DATED: April 14, 2022

STOEL RIVES LLP

By: /s/ Edward C. Duckers

ERIC A. GRASBERGER (*admitted pro hac vice*)
EDWARD C. DUCKERS (SB # 242113)
MARIO R. NICHOLAS (SB #273122)

Attorneys for Plaintiff
JH Kelly, LLC